No. 490.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HOWARD INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error.

vs.

S. SILVERBERG AND WILLIAM C. PEASE,

Defendants in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

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In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

THE HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff,
vs.
S. SILVERBERY and WILLIAM C. PEASE,
Defendants.

Complaint.

The plaintiff, complaining, avers:

I.

That it is now, and at all the times hereinafter named it was, a corporation formed, organized and existing, under the laws of the State of New York, and it was at all of such times, and yet is, a citizen and resident of the said State of New York.

II.

That the defendants above-named, S. Silverbery and William C. Pease, were at all of the times hereinafter named, and they yet are, citizens and residents of the State of California.

III.

That on the first day of February, 1892, and long prior thereto, the Superior Court of the city of New York, in

the State of New York, in the United States of America, was a Court of record of general jurisdiction, and as such it had jurisdiction of, and there was pending therein at the date last-named, a certain action wherein the plaintiff hereinbefore named were defendant and Julius Jacobs and George Easton were plaintiffs, and the said Court on said first day of February, 1892, duly gave, made, and entered its jurisdiction in said action in favor of this plaintiff and against the said Julius Jacobs and George Easton, whereby the said Superior Court of the said city of New York considered and adjudged that this plaintiff have and recover of and from said Julius Jacobs and George Easton the sum of seven thousand four hundred and eighty-five and eighty-three one-hundredths ($7,485.83) dollars.

IV.

That on the second day of June, 1876, the legislature of the State of New York enacted, and its governor approved, a certain statute entitled "An Act relating to courts, officers of justice, and civil proceedings," which said act remains unrepealed, and was in force and effect at all the times hereinafter named, and was commonly known and styled the Code of Civil Procedure; that section 1346 of said code declares that an appeal may be taken to the general term of the Supreme Court or to a general term of a superior city court, from a final judgment entered in the same court; that section 1300 of said code declares that an appeal must be taken by serving upon the attorney of the adverse party, and upon the clerk with whom the judgment or order ap-

pealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order, or from a specific part thereof; that after the entry of said judgment, and before the tenth day of August, 1892, the said Jacobs and Easton appealed from the said judgment against them to the general term of the Superior Court of said city of New York by serving a notice of such appeal upon the attorney of this plaintiff and upon the clerk of said Court by filing such notice of appeal with such clerk, in which notice the said Jacobs and Easton specified that they appealed from such judgment and the whole thereof; that section 1307 of the same code declares that every appellant is required to file with the clerk with whom the judgment appealed from is entered, an undertaking on appeal as prescribed in such code; that section 1352 of the same code declares that upon appeal to the general term of said Superior Court, the appellant may give the security required to perfect an appeal to the Court of Appeals of the same State from a judgment, in the same amount or to the same effect, and to stay the execution thereof, in which case that the execution of the judgment is stayed as upon an appeal to the Court of Appeals, and subject to the same conditions; that section 1326 of the same code declares that to render the notice of appeal to the Court of Appeals effectual for any purpose, to perfect the appeal, the appellant must give a written undertaking to the effect that he will pay all costs and damages which may be awarded against him on the appeal not exceeding five hundred dollars, and that the appeal is perfected when such undertaking is

given, and a copy thereof with a notice of the filing thereof is served as prescribed in said code; that section 1327 of the same code declares that if an appeal is taken from a judgment for a sum of money, it does not stay the execution of the judgment until the appellant gives a written undertaking to the effect that if the judgment appealed from, or any part thereof, is affirmed or the appeal dismissed, he will pay the sum directed to be paid by the judgment, or the part thereof as to which it is affirmed; that section 811 of the same code declares that where any provision of that act provides for a bond or undertaking with sureties, to be given by or on behalf of any person, he need not join in the execution thereof; that section 812 of the same code declares that a bond or undertaking executed by a surety or sureties must, where two or more persons execute it, be joint and several in form, and, except as otherwise prescribed by law, must be accompanied by the affidavit of each surety thereto to the effect that he is a resident of, and a householder or freeholder within, the State, and is worth the penalty of the bond over all the debts and liabilities which he owes or has incurred and exclusive of the property exempt by law from levy and execution; that section 1310 of said code declares that where an appeal to the general term of any court, or to the Court of Appeals, or otherwise, has been heretofore, or shall hereafter, be perfected, and the other acts, if any are required to be done to stay the execution of the judgment or order appealed from, had been done, the appeal stays all proceedings to enforce the judgment appealed from; that section 1211 of the said code declares

that a judgment for a sum of money rendered in any court of the State of New York bears interest from the time of its entry; that in the month of June, 1879, the legislature of the State of New York passed, and its governor approved, an act fixing and regulating the interest on money within the State last named, which last described act provides and declares that the rate of interest on a loan or forbearance of money, goods, or things in action shall be six dollars upon one hundred dollars for one year, and for that rate for a greater or less sum or for a longer or shorter time, which said statute remains unrepealed and in full force.

V.

That the said Jacobs and Easton desired to appeal from said judgment against them, and to stay the execution thereof pending such appeal, but were, as plaintiff is informed and believes, unable to procure sureties upon their undertaking on such appeal residing in the State of New York, and said Jacobs and Easton thereupon requested this plaintiff to accept as sureties on such undertaking the defendants hereinbefore named, who then resided in the said State of California, and this plaintiff thereupon agreed to accept the defendants as such sureties, notwithstanding they resided in the State of California, and to waive the rights to sureties residing within the State of New York, and thereupon, on the tenth day of August, 1892, the said defendants, at the request of the said Jacobs and Easton, and for the purpose of perfecting such appeal and obtaining a stay of execution, did make, execute and deliver, within said State of California, their

undertaking on appeal in the words and figures following:

Superior Court of the City of New York.

JULIUS JACOBS and GEORGE EASTON,

Appellants,

vs.

THE HOWARD INSURANCE COMPANY OF NEW YORK,

Respondent.

Undertaking on Appeal from a judgment directing the payment of money.

Undertaking.

Whereas, on the first day of February, 1892, in the Superior Court of the city of New York, the Howard Insurance Company of New York, the respondent, recovered a judgment against Julius Jacobs and George Easton, the appellants, for seven thousand four hundred and eighty-five dollars and eighty-three cents ($7,485.83), and the appellants, feeling aggrieved thereby, have appealed therefrom to the general term of said Superior Court.

Now, therefore, we, S. Silverberg, residing at No. 1526 Sutter street in the city of San Francisco, California, and Wm. C. Pease, residing at No. 815 Lombard street, in said city of San Francisco, do jointly and severally, pursuant to the statute in such cases made and provided, undertake that the appellants will pay all costs and damages which may be awarded against the appellants on said appeal, not exceeding five hundred dollars, and do also undertake

that if the judgment so appealed from, or any part thereof, is affirmed, or the appeal dismissed, the appellants will pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which judgment shall be affirmed.

Dated, San Francisco, Aug. 9, 1892.

S. SILVERBERY.

WM. C. PEASE.

City and County of San Francisco—ss.

Simon Silverberg, one of the sureties to the foregoing undertaking, being sworn, says that he is a resident and freeholder within the State of California, and is worth twice the sum specified in the above undertaking over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

S. SILVERBERG.

Sworn to before me this tenth day of August, 1892.

At the city and county of San Francisco, State of California.

JAMES L. KING,

Commissioner for New York, in San Francisco, California.

[Seal]

City and County of San Francisco—ss.

William C. Pease, one of the sureties to the foregoing undertaking, being sworn, says that he is a resident and freeholder with the State of California, and is worth

twice the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

WM. C. PEASE.

Sworn to before me this tenth day of August, 1892.

At the city and county of San Francisco, State of California.

JAMES L. KING,

Commissioner for New York, in San Francisco, California.

[Seal.]

State of California,
County of San Francisco. } ss.

I certify that on this tenth day of August, 1892, before me appeared the above-named Simon Silverberg and William C. Pease, known to me and to me known to be the individuals described in, and who executed, the above undertaking, and severally acknowledged that they executed the same.

JAMES L. KING,

Commissioner for New York, in San Francisco, Cal.

VI.

That section 1305 of said code declares that any undertaking which an appellant is required to give, or any other act which he is required to do for the security of the respondent, may be waived by the written consent of such respondent. That after the execution of the said undertaking, towit, on or about the tenth day of September,

1892, this plaintiff stipulated in writing that it would not except to the sureties thereon, and that such undertaking might be filed in said Superior Court of said city of New York, that no exception should be taken by this plaintiff to the form of the undertaking or the time of its filing or the justification of the sureties, and that such undertaking should operate as a stay of proceedings; that thereafter on the same day, the said undertaking on appeal was filed by the said Jacobs and Easton in the office of the clerk of said Superior Court last named, and a copy thereof served upon this plaintiff, and the appeal of said Jacobs and Easton from the said judgment was then perfected, and a stay of the execution thereof effected, and the plaintiff herein, relying upon the said undertaking, did not take out any execution on the said judgment, nor take any proceedings thereunder until after its affirmance as hereinafter stated; that under and by virtue of the laws of the State of New York, and especially by sections 1326, 1327, and 1352 of that part of such laws commonly known and styled the Code of Civil Procedure, the effect of the giving and filing of such undertaking was to stay all proceedings upon such judgment until the same should be affirmed by the general term of said Superior Court of said city of New York, and from and after the filing of said undertaking until the affirmance of such judgment, as hereinafter set forth, all proceedings upon said judgment were stayed.

VII.

That thereafter, on the fifteenth day of January, 1894, the said general term of the said Superior Court of said

city of New York duly gave, made, and entered its order and judgment wherein and whereby it affirmed in all respects the said judgment so appealed from as hereinbefore described, and at the same time awarded this plaintiff for costs and damages on such appeal the sum of one hundred and seventeen and fifty-nine one-hundredths dollars, for which said sum the general term of the Superior Court of said city of New York then and there duly gave, made and entered its judgment in favor of this plaintiff and against the said Jacobs and Easton. That section 1309 of said code provides that an action shall not be maintained upon any undertaking given upon an appeal until ten days have expired since the service upon the attorney for the appellant, and upon the sureties upon such undertaking, of a written notice of the entry of a judgment or order affirming the order or judgment appealed from; that such service may be made by mailing such notice in a postpaid wrapper addressed to such surety or sureties at the last known postoffice address of such surety or sureties. That on the fifteenth day of January, 1894, this plaintiff, by its attorneys, served upon the attorneys in said action of said appellants, Jacobs and Easton, personally, a written notice of the entry of such judgment of affirmance and awarding the sum of one hundred and seventeen and fifty-nine one-hundredths dollars. That thereafter, on the seventeenth day of April, 1897, this plaintiff, by its attorneys, served upon the defendants herein a written notice of the entry of the judgment affirming the judgment so appealed from, which said service was made by mailing to each of the said defendants in a postpaid wrapper, addressed to each of said defend-

ants at his last known postoffice address, towit, the city of San Francisco, in the State of California. That no part of the said judgment for seven thousand four hundred and eighty-five and eighty-three one-hundredths ($7,485.83) dollars, nor of said judgment for one hundred and seventeen and fifty-nine one-hundredths ($117.59) dollars has been paid, though payment thereof has often been demanded, and both of said judgments remain in full force and effect, and no other or further proceedings have been taken to stay the further execution thereof.

VIII.

That at all the times herein named the Court of Appeals of said State of New York was a court of record of general jurisdiction, and section 190 of said code provided and declared that said Court of Appeals had exclusive jurisdiction to review upon appeal every determination made at a general term by the Supreme Court or by either of the city courts of said State of New York in every case where a final judgment has been rendered in an action commenced in either of those courts or brought there from another court; that section 1325 of the same code limited the time within which an appeal might be taken to said Court of Appeals to one year from and after final judgment had been entered upon the determination of the general term of the court below and the judgment-roll filed; that thereafter, on or about the thirteenth day of December, 1894, the said Jacobs and Easton appealed to said Court of Appeals from the judgment of affirmance entered as aforesaid by the said general term, and the said Court of Appeals, by its order duly given, made and

entered in the year 1896, affirmed said judgment so appealed from, and said judgment of the said Superior Court of said city of New York thereupon became final.

Wherefore, the plaintiff demands judgment against the defendants for the sum of seven thousand four hundred and eighty-five and eighty-three one-hundredths ($7,485.83) dollars, with interest thereon from the first day of February, 1892, at the rate of six per cent per annum, and for the sum of one hundred and seventeen and fifty-nine one-hundredths ($117.59) dollars with interest thereon from the fifteenth day of January, 1894, at the rate of six per cent per annum, and costs of suit.

Dated, Dec. 21, 1897.

FREEMAN and BATES,
Attorneys for plaintiff.

City and County of San Francisco, } ss.
State of California. }

A. C. Freeman, being first duly sworn, on oath says: that he and George E. Bates, practicing law under the firm name of Freeman & Bates, are the attorneys for the plaintiff named in the foregoing complaint, and that he and said Bates both reside and have their office within the said city and county of San Francisco; that the plaintiff, The Howard Insurance Company of New York, is not a resident of, nor is it within, the State of California, and it and all of its officers and agents are absent from the said city and county, and for that reason this affiant makes this verification on the behalf of the said plaintiff; that the foregoing complaint is true of affiant's own

knowledge, except as to the matters therein stated on information and belief, and as to those matters, that he believes it to be true.

A. C. FREEMAN.

Subscribed and sworn to before me, this twenty-first day of December, 1897.

JAMES MASON,

Notary public, in and for the city and county of San Francisco, State of California.

[Seal.]

[Endorsed]: Filed Dec. 22, 1897. Southard Hoffman. Clerk, by W. B. Beaizley, Deputy Clerk.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA.

THE HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff,
vs.
S. SILVERBERG and WILLIAM C. PEASE,
Defendants.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City and County of San Francisco.

Summons.

The President of the United States of America, Greeting:
To S. Silverberg and William C. Pease, Defendants.

You are hereby directed to appear, and anwer the com-

plaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, within ten days after the service on you of this summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

Witness: the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this twenty-second day of December in the year of our Lord one thousand eight hundred and ninety-seven and of our Independence the one hundred and twenty-second.

SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Seal.]

[Endorsed]: United States Marshal's Office, Northern District of California. I hereby certify that I received the within writ on the twenty-second day of December, 1897, and personally served the same on the twenty-third day of December, 1897, upon S. Silverberg and Wm. C. Pease, by delivering to and leaving with S. Silverberg and Wm. C. Pease, said defendants named therein, personally, at the city and county of San Francisco, in said district, a certified copy thereof, with a copy of the com-

plaint, certified to by plaintiff's attorney. Barry Baldwin, U. S. Marshal, by T. J. Gallagher, Deputy. San Francisco, Jan. 5, 1898.

Filed Jan. 5, 1898. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

THE HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff,
vs.
S. SILVERBERG and WILLIAM C. PEASE,
Defendants.
No. 12,545.

Demurrer.

The defendants in the above-entitled action hereby demur to plaintiff's complaint herein, and for grounds of demurrer thereto, specify:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That the cause of action therein alleged is barred by the provisions of sections 312, 335, and subdivision 1 of section 339, of the Code of Civil Procedure of the State of California.

III.

That said complaint is uncertain in this, that it does not appear therefrom:

(*a*) With whom the plaintiff agreed to accept the defendants as sureties upon the undertaking in said complaint set forth.

(*b*) With whom this plaintiff stipulated in writing that it would not except to the sureties on the undertaking set out in the complaint, and that such undertaking should operate as a stay of proceedings.

(*c*) What were the terms of said stipulation.

(*d*) For how long was it stipulated that said undertaking should operate to stay proceedings.

(*e*) Until what affirmance of the judgment mentioned in said complaint, were proceedings thereupon stayed.

IV.

That said complaint is unintelligible in each of the particulars in which it is above specified that it is uncertain.

V.

That said complaint is ambiguous in each of the particulars in which it is above specified that it is uncertain.

VI.

That said complaint is ambiguous in this that it states therein that said undertaking was made, executed, and delivered within said State of California, while it also appears therein that said undertaking was signed before a commissioner for the State of New York; was served upon the plaintiff in the State of New York, and was filed in the State of New York.

Wherefore these defendants pray to be hence dismissed with their costs.

LESTER H. JACOBS,
Attorney for defendants.

DEAL, TAUSZKY & WELLS,
Of counsel.

I hereby certify that in my opinion the above demurrer is well founded in point of law and that it is not interposed for delay.

EDMUND TAUSZKY,
Of counsel for defendants.

[Endorsed]: Service of the within demurrer is hereby admitted this first day of February, A. D. 1898. Freeman & Bates, attorneys for plaintiff.

Filed February first, 1898. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff,
vs.
S. SILVERBERG and WILLIAM C. PEASE,
Defendants.

Judgment.

The Court having sustained the demurrer of the defendants to plaintiff's complaint herein, and ordered that this cause be dismissed;

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the plaintiff take nothing by this action, that the defendants go hereof without day, and that defendants recover from plaintiff their costs in this behalf expended, taxed at $19.30.

Judgment entered Aug. 22, 1898.

SOUTHARD HOFFMAN,
Clerk.

A true copy.

Attest:

SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Seal.]

[Endorsed]: Filed Aug. 22, 1898. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

HOWARD INSURANCE CO. OF NEW YORK,
vs.
S. SILVERBERG et al.
} No. 12, 545.

Certificate to Judgment Roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this twenty-second day of August, 1898.

SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Seal.]

[Endorsed]: Judgment-roll. Filed Aug. 22, 1898. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff,
vs.
S. SILVERBERG and WILLIAM C. PEASE,
Defendants.
No. 12, 545.

Opinion on Demurrer to Complaint.

Messrs. Freeman & Bates, attorneys for plaintiff.

Lester H. Jacobs, Esq., and Messrs. Deal, Tauszky & Wells, attorneys for defendants.

MORROW, Circuit Judge:

This is an action to recover the sum of $7,485.83 from S. Silverberg and Wm. C. Pease, as sureties on the bond of Julius Jacobs and George Easton, against whom this plaintiff recovered a judgment in the Superior Court of the city of New York. The plaintiff is a corporation organized and existing under the laws of the State of New York, and the defendants are citizens and residents of the State of California. A demurrer is interposed to the complaint on several grounds, among others, that the action is barred by the statute of limitations of the State of California, as contained in section 339 of the Code of

Civil Procedure. A motion is also made to strike out certain parts of the complaint. As the question of the bar of the statute of limitations will be conclusive of the case, it will be unnecessary to consider any of the other objections presented to the complaint.

The complaint shows that the plaintiff in this case recovered a judgment against Julius Jacobs and George Easton, on Feb. 1, 1892, in the Superior Court of the city of New York, for the sum of $7,485.83; that thereupon, after the entry of said judgment and before the tenth day of August, 1892, the said Jacobs and Easton appealed from said judgment rendered against them to the general term of the Superior Court of the city of New York; that, by virtue of section 1307 of the Code of Civil Procedure of the State of New York, it was necessary, in order to perfect said appeal, to file with the clerk with whom the judgment appealed from is entered, an undertaking on appeal as prescribed in such code; that said Jacobs and Easton desired to appeal from said judgment against them and to stay the execution thereof pending such appeal, but were unable to procure sureties upon their undertaking on such appeal residing in the State of New York, and said Jacobs and Easton thereupon requested this plaintiff to accept as sureties on such undertaking the defendants hereinbefore named, who then resided in the State of California, and the plaintiff thereupon agreed to accept the defendants as such sureties, notwithstanding they resided in the State of California, and to waive the right to sureties residing within the State of New York; and thereupon, on the tenth day of August, 1892,

the said defendants, at the request of the said Jacobs and Easton, and for the purpose of perfecting such appeal and obtaining a stay of execution, did make, execute and deliver, within the State of California, their undertaking on appeal. The condition of the bond was that the appellants "pay all costs and damages which may be awarded against the appellants on said appeal, not exceeding five hundred dollars, and do also undertake that if the judgment so appealed from or any part thereof, is affirmed,or the appeal dismissed,the appellants will pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which judgment shall be affirmed." It further appears, from the complaint, that after the execution of the undertaking, towit, on or about the tenth day of September, 1892, the plaintiff stipulated in writing that it would not except to the sureties thereon, and that such undertaking might be filed in said Superior Court of said city of New York, that no exception should be taken by the plaintiff to the form of the undertaking or the time of the filing or its justification of the sureties, and that such undertaking should operate as a stay of proceedings; that thereafter on the same day, the said undertaking on appeal was filed by the said Jacobs and Easton in the office of the clerk of said Superior Court last named, and a copy thereof served on this plaintiff; that thereafter, on the fifteenth day of January, 1894, the said general term of the said Superior Court of said city of New York duly gave, made and entered its order and judgment affirming in all respects the said judgment so appealed from and at

the same time awarded the plaintiff for costs and damages the sum of $117.59; that, by section 1309 of the Code of Civil Procedure of the State of New York, it is provided that an action shall not be maintained upon any undertaking given upon an appeal until ten days have expired since the service upon the attorney for the appellant of a written notice of the entry of a judgment or order affirming the order or judgment appealed from; that, on the fifteenth day of January, 1894, the plaintiff, by its attorneys, served upon the attorneys in said action of said appellants, Jacobs and Easton, personally, a written notice of the entry of such judgment of affirmance and awarding the sum of $117.59. It is, also, further averred that thereafter, on the seventeenth day of April, 1897, the plaintiff, by its attorneys, in accordance with the provisions of section 1309 above referred to served upon the defendants in this suit a written notice of the entry of the judgment affirming the judgment so appealed from, which said service was made by mailing to each of the said defendants in a postpaid wrapper, addressed to each of said defendants at his last known postoffice address, towit, the city of San Francisco, in the State of California. It is also further averred that on or about the thirteenth day of December, 1894, the said Jacobs and Easton appealed to the Court of Appeals of the State of New York from the judgment of affirmance entered as aforesaid by the general term, and the said Court of Appeals, by its order duly given, made and entered in the year 1896, affirmed said judgment so appealed from, and said judgment of the Superior Court of the city of New York thereupon became final.

It is contended by counsel for defendants that the cause of action set forth in the complaint as above stated is barred by the provision of the statute of limitations of this State, as contained in subdivision one of section 339 of the Code of Civil Procedure of this State, which provides that the period prescribed for the commencement of "an action upon any contract, obligation, or liability, not founded upon an instrument of writing, *or founded upon an instrument of writing executed out of the state*" is two years. In support of this contention, it is maintained that the present action is "founded upon an instrument in writing executed out of the state"; that although signed in California, the undertaking was delivered in New York; that delivery is as essential to the validity of the execution of an undertaking as signing and justification of the sureties are; and that the undertaking sued on in this case can only be deemed to have been fully executed, in law, when the contract was given life by delivery in the State of New York. As this action was not begun until Dec. 22, 1897, and the judgment of the general term of the Superior Court of the city of New York was made and entered on Jan. 15, 1894, more than two years had elapsed before the bringing of this action, and, if the contention of counsel for the defendants be sound, it follows that the action is barred by the limitation prescribed in subdivision one of section 339 of the Code of Civil Procedure of this State, above referred to.

On behalf of the plaintiff, it is contended that the undertaking was, to all intents and purposes, executed in this State, and that, therefore, the limitation prescribed

by subdivision one of section 339 of the Code of Civil Procedure of this State is inapplicable, but that, on the contrary, the cause of action is governed by section 337 of the Code of Civil Procedure, which prescribed a period of four years within which "an action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this state," may be brought.

It is obvious that the controlling question is as to where the undertaking sued upon can be deemed to have been executed, whether in California or in New York. If in California, then the action would not be barred; if in New York, it would be. We, therefore, inquire into what constituted the execution of an undertaking. That delivery is essential to the valid execution of an undertaking is elementary law. (Vol. 4 Am. & Eng. Ency. of Law, p. 622, and cases there cited.) Further, it must have been accepted by the obligee. (Id. p. 623, and cases there cited.) In these respects, a bond or an undertaking is like a deed. Section 1626 of the Civil Code of California provides that "a contract in writing takes effect upon its delivery to the party in whose favor it is made or to his agent." Section 1933 of the Code of Civil Procedure of California provides: "The execution of an instrument is the subscribing and delivering it, with or without affixing a seal." The importance of a delivery with reference to the valid execution of the undertaking in this case is evident, for it is too plain for question that had the undertaking been signed in California, but never delivered in New York, and filed with the clerk of the Court as required by law, no rights would have been derived under

it and no liability would have been created against the sureties. (Clark v. Child, 66 Cal. 87; Stetson v. Briggs, 114 Cal. 511; Ivey v. Kern Co. Land Co., 115 Cal. 196, 201.) In the latter case, the following language was used: "The acceptance and execution of the proposed contract was not complete until such delivery, and the place of delivery, being the place where the last act is performed which is necessary to render the contract obligatory, is the place where the contract is made." (Citing Ford v. Buckeye State Ins. Co., 99 Am. Dec. 668; Milliken v. Pratt, 125 Mass. 375; Ames v. McCamber, 124 Mass. 85; Northampton Live Stock Ins. Co., 40 N. J. L. 476; Shuenfeldt v. Junkermann, 20 Fed. Rep. 357; Whiston v. Stodder, 8 Mart. (La.) 95, 13 Am. Dec. 281; Scudder v. Union Nat. Bank, 91 U. S. 406.) The undertaking in this case was given to perfect an appeal and to stay proceedings in the State of New York in an action pending in that State. As a matter of law, it could only become operative for these purposes, and the liability of the bondsmen to the plaintiff could only accrue and become fixed when the undertaking was filed with the clerk of the Court. (Section 1326, Code of Civil Procedure of New York.) The undertaking had no validity for the purposes for which it was given until it was filed with the clerk of the Court, and it is the filing which, in law, must be the delivery of an undertaking. It was held in Raymond v. Richmond, 76 N. Y. 106, that until an undertaking is filed and served, there is no appeal. See, further, on the general proposition that there is no appeal until the appeal bond is filed. (Webber v. Bueger (Col.), 27 Pac. Rep. 871; Holloran v.

Midland Ry. Co., 28 N. E. Rep. 549; Providence Insurance Co. v. Wagner, 37 Fed. Rep. 59; The S. S. Osbourne, 105 U. S. 447, 450.) In the case of Sleden v. Delaware & Hudson Canal Co., 29 N. Y. 634, it was held that where a bond had to be filed in the county clerk's office, the acceptance by the clerk constituted the delivery. The undertaking, therefore, having been delivered, and the execution completed, by its being filed with the clerk of the Court in New York, where the judgment was rendered, it must, in the eyes of the law, be deemed to have been executed in New York. "Where a contract is delivered or first becomes a binding obligation upon the parties, is deemed the place of contract for the purpose of distinguishing what law governs." (Vol. 3 Am. & Eng. Ency., p. 547.) The following cases tend to establish this doctrine: Milliken v. Pratt, 125 Mass. 374; Cook v. Litchfield, 9 N. Y. 279; Lawrence v. Bassett, 5 Allen, 140; Bell v. Packard, 69 Me. 105; Lee v. Selleck, 33 N. Y. 615; Bruce v. State of Maryland, 11 G. & J. 383; McPherson v. Meek, 30 Mo. 345; Wildcat Branch Bank v. Ball, 45 Ind. 213; Wayne County Savings Bank v. Low, 9 Abbotts' New Cases, 390; Duncan v. United States, 7 Peters, 435; Tilden v. Blair, 21 Wallace 241; Shuenfeldt v. Junkermann, 20 Fed. Rep. 357; Com. v. Kendig, 2 Penn. St. 448; Hall v. Parker, 26 Am. Rep. 540; State v. Young, 23 Minn. 551; Flanagan v. Feyer & Co., 41 Ala. 132; United States v. Le Baron, 19 How. 72.) An agreement by the consignor to indemnify his consignees residing in another State against liability by their having voluntarily become security to release his vessel from attachment, is to be regarded as a contract governed by the

law of the latter place. (Boyle v. Zacharie, 6 Pet. (U. S.) 635.) See, also, Woodhull v. Wagner, Bald C. C. 296.

The pendency of the appeal from the general term of the Superior Court of the city of New York to the Court of Appeals, as set forth in the complaint, could not operate to extend the statute of limitations. The bond was given to abide the decision on appeal, of the general term of the Superior Court of the city of New York, not of the Court of Appeals. It did not purport to relate to the Court of Appeals. The sureties did not obligate themselves to answer any costs and damages to be adjudicated by that Court. Their liability was limited strictly to the decision and judgment of the general term of the Superior Court of the city of New York. In the following cases in New York, it has been held that it is no defense to a statute of limitations on a suit based upon an undertaking to stay proceedings on appeal to the general term of the Superior Court, that the defendant had since appealed to the Court of Appeals: Burrall v. Vanderbilt, 6 Abbotts' Prac. 70; Heebner v. Townsend, 8 Abbotts' Prac. 234.

There is nothing in the other objections presented by counsel for plaintiff. Upon the whole of the case, I conclude that the undertaking sued upon in the case at bar was executed in law, in the State of New York, and that any action thereon against the sureties is barred by the provisions of section 339 of the Code of Civil Procedure of this State.

The complaint will be dismissed, and it is so ordered.

[Endorsed]: Filed Aug. 22, 1898. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

AT LAW.

THE HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff,
vs.
S. SILVERBERG and WILLIAM C. PEASE,
Defendants.
No. 12, 545.

Petition for Writ of Error.

Now comes the Howard Insurance Company of New York, a foreign corporation, and says that on or about the twenty-second day of August in the year 1898, this Court entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the rec-

ord, proceedings, and papers in this cause duly authenticated, may be sent to the said Circuit Court of Appeals.

A. C. FREEMAN,
GEORGE E. BATES,
Attorneys for plaintiff.

[Endorsed]: Filed Oct. 20, 1898. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

AT LAW.

THE HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff,
vs.
S. SILVERBERG and WILLIAM C. PEASE,
Defendants.
No. 12, 545

Assignment of Errors.

The plaintiff in this action The Howard Insurance Company of New York, a foreign corporation, in connection with its petition for a writ of error herein, makes the following assignment of errors, which it avers occurred upon trial of the cause, towit:

1. The Court erred in deciding that the plaintiff's cause of action was barred by the provisions of section 339 of the Code of Civil Procedure of California.

2. The Court erred in ordering the cause to be dismissed without giving the plaintiff any opportunity to amend its complaint.

3. The Court erred in sustaining the defendants' demurrer to the plaintiff's complaint.

4. The Court erred in ordering the cause dismissed.

5. The Court erred in giving and rendering judgment in favor of the defendants and against the plaintiff.

A. C. FREEMAN,
GEORGE E. BATES,
Attorneys for plaintiff.

[Endorsed]: Filed Oct. 20, 1898. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

THE HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff,
vs.
S. SILVERBERG and WILLIAM C. PEASE,
Defendants.
No. 12, 545.

Order Allowing Writ of Error.

This twentieth day of October, 1898, came the plaintiff by its attorneys, and filed herein and presented to the

Court its petition, praying for the allowance of a writ of error intended to be urged by it, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such order and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does allow the writ of error upon the plaintiff giving an undertaking, according to law, in the sum of five hundred dollars, which shall operate as a supersedeas bond.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Oct. 20, 1898. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

THE HOWARD INSURANCE COMPANY OF NEW YORK, Plaintiff, vs. S. SILVERBERY and WILLIAM C. PEASE, Defendants.	No. 12,545.

Undertaking on Writ of Error.

Know all men by these presents that we, C. W. Clarke and Samuel Davis of the city and county of San Francisco, of the State of California, are held and firmly bound unto the defendants, S. Silverberg and William C.Pease, in the full and just sum of five hundred dollars, to be paid to the said defendants, their certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seals, and dated this twenty-second day of October, in the year of our Lord eighteen hundred and ninety-eight.

Whereas, lately in the Circuit Court of the United States for the Ninth Circuit, in and for the Northern District of California, in a suit depending in said Court between The Howard Insurance Company of New York, a foreign corporation, plaintiff, and S. Silverberg and William C. Pease, defendants, a judgment was rendered against the said plaintiff; and the said plaintiff having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Court, to revise the said judgment in the aforesaid suit, and a citation directed to the said S. Silverberg and William C. Pease citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco in said circuit on the nineteenth day of November, 1898. Now the condition of the above obligation is such that if the said The Howard Insurance Company of New York shall prosecute said

writ of error to effect and answer all damages and costs, if it shall fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

C. W. CLARKE, (Seal)
SAMUEL DAVIS. (Seal.)

Signed, sealed, and delivered in the presence of

_____

City and County of San Francisco, } ss.
State of California. }

C. W. Clarke and Samuel Davis being first duly sworn, on oath says, each for himself and not one for the other, that he is a resident and freeholder within the Northern District of California, towit, within the said county and State, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. W. CLARKE.
SAMUEL DAVIS.

Subscribed and sworn to before me this twenty-second day of October, 1898.

JAMES MASON,
Notary Public.

[Seal]

The above undertaking on appeal is approved this twenty-second day of October, in the year 1898.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Oct. twenty-second, 1898. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

THE HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff,
vs.
S. SILVERBERG and WILLIAM C. PEASE,
Defendants.

Certificate to Record.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, do hereby certify the foregoing thirty (30) written pages, numbered from 1 to 30 inclusive, to be a full, true and correct copy of the record and of the proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $24.80, and that said amount was paid by the plaintiff's attorneys.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Circuit Court, this thirty-first day of October, A. D. 1898.

SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[Seal.]

[Cancelled 10 ct. Revenue Stamp.]

Writ of Error.

United States of America.—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The Howard Insurance Company of New York, plaintiff in error, and S. Silverberg and William C. Pease, defendants in error, a manifest error hath happened, to the great damage of the said The Howard Insurance Company of New York, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the nineteenth day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

[Seal.]

Allowed by:

WM. W. MORROW,

Judge.

[Endorsed]: Receipt of a copy thereof is hereby admitted this twenty-seventh day of October, 1898. Lester H. Jacobs, attorney for defendant in error.

[Endorsed]: Original. No. 12,545. Circuit Court of the United States, Ninth Circuit, Northern District of California. Howard Insurance Company of New York, plaintiff in error, vs. S. Silverberg et al., defendant in error. Writ of error.

The answer of the judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California:

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within con-

tained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

SOUTHARD HOFFMAN,
Clerk.

[Seal.]

Filed Oct. 27, 1898. Southard Hoffman, Clerk, by ————————, Deputy Clerk.

Citation.

United States of America.—ss.

The President of the United States, to S. Silverberg and William C. Pease, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the nineteenth day of November next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 12,545, wherein The Howard Insurance Company of New York is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this twenty-fourth day of October, A. D. 1898.

WM. W. MORROW,
Judge.

[Endorsed]: Receipt of a copy thereof is hereby admitted this twenty-seventh day of October, 1898. Lester H. Jacobs, attorney for defendants in error.

[Endorsed]: Original. No. 12,545. Circuit Court of the United States, Ninth Circuit, Northern District of California. Howard Insurance Company of New York v. S. Silverberg et al. Citation.

Filed Oct. 27, 1898. Southard Hoffman, Clerk, by ————, Deputy Clerk.

[Endorsed]: No. 490. United States Circuit Court of Appeals for the Ninth Circuit. Howard Insurance Company of New York, plaintiff in error, vs. S. Silverberg and William C. Pease, defendants in error. Transcript of record. In error to the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

Filed Nov. 7, 1898.

F. D. MONCKTON,
Clerk.